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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1555

KAISER INDUSTRIES CORPORATION, *et al., Petitioners*

v.

JONES & LAUGHLIN STEEL CORPORATION, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals, which is unofficially reported at 185 U.S.P.Q. 343 (1975), is set forth in the Appendix at pp. 1-41. The opinion of the District Court, which has not been reported, is set forth in the Appendix at pp. 43-593.

JURISDICTION

The judgment of the Court of Appeals was entered on April 4, 1975. (App. 42) [1] The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals decided this case in a way in conflict with *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation,* 402 U.S. 313 (1971), by refusing to accept the ultimate *Blonder-Tongue* test of collateral estoppel—a trial court's principled determination that it would not be "just and equitable to allow the plea of estoppel in the case before it"—and by holding instead that an estoppel plea must automatically be allowed because the prior proceeding on which the plea is based met the standards of procedural due process.

2. Whether in overruling the "mutuality" requirement of *Triplett* v. *Lowell,* 297 U.S. 638 (1936), this Court intended in *Blonder-Tongue* to erect (as the Court of Appeals did erect in this case) a bar to relitigation of patent validity issues which is more stringent than the general rule of collateral estoppel imposed in other areas of the law.

STATEMENT OF THE CASE [2]

Petitioners are Vereinigte Oesterreichische Eisen- und Stahlwerke Aktiengesellschaft ("VOEST"), a

[1] References to the Appendix to this Petition are designated as "App." with a page number.

[2] The facts are extensively set forth in the opinions of the courts below and will only be summarized here.

steel company owned by the Austrian Government; Brassert Oxygen Technik AG. ("BOT"), a subsidiary of VOEST; and Kaiser Industries Corporation ("Kaiser"). VOEST holds the rights to the Basic Oxygen Process for refining steel (the "Basic Oxygen Process"), including the United States patent covering this process (the "Suess patent").[3] BOT holds worldwide rights to license the Basic Oxygen Process. Kaiser is the exclusive licensing agent for BOT in the United States.

Steelmaking involves two processes—smelting and refining. In the smelting process, iron ore is converted into molten pig iron in a blast furnace. In the refining process, molten pig iron is converted into steel by the removal of carbon, sulphur, phosphorus, and other impurities.

During the first half of the 20th century, most steel was refined by the "open-hearth" process, which involves "cooking" pig iron and scrap in large open-hearth furnaces heated by oil or gas. While this process produces satisfactory steel, it entails high capital and operating costs and requires from 10 to 12 hours for a single refining operation.

The Basic Oxygen Process is completely different from the open-hearth process and dramatically superior to it. Invented in 1949 by Dr. Theodor Suess and three colleagues working at the VOEST plant in Linz, Austria, the Basic Oxygen Process accomplishes refining by blowing a jet of oxygen vertically down

[3] The Suess patent, the patent in suit, is reproduced at App. 805-12. The text of the patent specification and claims is set forth in more readable type at App. 813-34.

upon a "bath" of molten pig iron in a pear-shaped "basic oxygen furnace." Numerous experimenters—experts such as Schwarz, Miles, Durrer and Hellbruegge—had tried to develop such a process but had consistently failed, primarily because they conceived that refining could be achieved with oxygen only if the oxygen was blown deeply into the bath for the purpose of stirring or "agitating" the molten metal with the oxygen jet. Such "deep penetration" results in costly damage to the lining of the steelmaking furnace and does not produce high-quality steel. Dr. Suess and his colleagues discovered that efficient refining could be achieved only by avoiding deep penetration of the oxygen and material agitation of the bath by the physical action of the oxygen stream, and by relying instead upon chemical reactions in the surface center region of the bath to circulate the molten metal. This circulation brings all the metal into contact with the refining action of the oxygen, without damaging the lining of the furnace.

The Basic Oxygen Process is the first commercially practicable oxygen steelmaking process. Respondent's former president has characterized it as "the only major technological breakthrough at the ingot level in the steel industry since before the turn of the century." (App. 646) The process produces steel equal in quality to that produced by the open-hearths, but requires less than 40 minutes for a comparable refining operation. Moreover, the Basic Oxygen Process involves roughly one-half the capital costs of the open-hearth process, much lower operating costs, and substantial environmental advantages.

For these reasons, the Basic Oxygen Process has been adopted throughout the world. The record shows

that some ninety steel companies have installed the process, including every major steelmaker in the United States. By 1970, domestic production by this process had surpassed production by the open-hearth process, and the domestic steel industry had saved over $1.5 billion in capital costs and was saving some $300 million per year in operating costs by reason of its use of the Basic Oxygen Process. Today the savings attributable to the process are even greater, since no new open-hearth furnaces are being built and use of the Basic Oxygen Process continues to expand. Respondent alone, by its use of this process, has realized capital cost savings in excess of $81 million and is enjoying operating cost savings of about $16 million per year.

Steelmakers in 25 countries have paid substantial royalties for use of the Basic Oxygen Process. In the United States six steelmaking companies initially obtained licenses under the Suess patent covering the process, but those licenses have since been repudiated and American producers are presently litigating the validity of the Suess patent.[4]

That patent, which issued in 1957, has been the subject of two trials. The first was in *Henry J. Kaiser Co.* v. *McLouth Steel Corp.*, 257 F. Supp. 372 (E.D. Mich. 1966) (District Judge Ralph M. Freeman) (App. 654-805), *aff'd sub nom. Kaiser Industries Corp.* v. *McLouth Steel Corp.*, 400 F. 2d 36 (6th Cir. 1968) (App. 603-644), *cert. denied,* 393 U.S. 1119 (1969). The second trial was in this case, initiated against Jones & Laughlin Steel Corporation ("J & L") in

[4] Thirteen infringement actions brought by petitioners against the major American steel companies are presently in the discovery stage awaiting final disposition of this case.

the early 1960's[5] and tried in the United States District Court for the Western District of Pennsylvania (Judge Louis Rosenberg) from October 1967 through March 1968.[6]

In both cases the trial courts found:

> —The Basic Oxygen Process was the first oxygen steelmaking process to make good steel and has been an overwhelming commercial success. (App. 139-40, 177-78, 511-12, 516, 651-53)
>
> —The Basic Oxygen Process was a "revolutionary" invention and a "patentable advance" in the art of steelmaking. (App. 139, 646, 766, 802)
>
> —The Basic Oxygen Process was neither anticipated by prior steelmaking art nor obvious at the time of its invention to persons skilled in that art. (App. 491-500, 504-16, 686-89, 715-16)
>
> —The Basic Oxygen Process was invented by the Suess patentees. (App. 500-04, 744-46)
>
> —The Suess patent, in its specification, describes the Basic Oxygen Process in full, clear, concise, and exact terms which have enabled persons skilled in the art to use that process. (App. 142-43, 523-36, 746-58)

The *McLouth* District Court, despite these conclusions, "reluctantly" held the Suess patent invalid. (App. 802) This holding was based on the *McLouth*

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[5] The case involves two consolidated actions, one brought by Kaiser in 1961 under 28 U.S.C. § 1332 for breach of an agreement licensing J & L to practice the Basic Oxygen Process at a designated J & L plant, and a second action brought by all three petitioners in 1962 under 28 U.S.C. § 1338(a) for infringement of the Suess patent at another, unlicensed, J & L plant.

[6] The record was subsequently reopened twice, as discussed at pages 10-11, *infra*.

District Court's conclusion that the final language of the Suess patent claims, as amended at the insistence of Examiners in the United States Patent Office, was defective. (App. 799)

Before amendment, the claims had referred to blowing oxygen onto a restricted impact area of the bath in such fashion as to "avoid deep penetration" of the oxygen jet into the molten metal. But at a conference in the Patent Office, Patent Examiners took the position that the concept of "avoiding deep penetration" taught in the specification should be expressed in claim language which, without changing the concept of the invention or broadening or narrowing the claims, would emphasize that the penetration of the oxygen jet is confined or localized in the surface center area of the bath, and that the oxygen jet is not used to stir or agitate the bath physically. (App. 206-08, 212) Accordingly, the final claims of the Suess patent, as amended and approved by the Patent Office, did not refer to "avoiding deep penetration" but instead referred to blowing oxygen "onto and below the surface of the bath at the central portion thereof, to an extent to avoid material agitation of the bath by the oxygen stream," the contact of the oxygen with the bath creating "a localized reaction zone spaced a substantial distance from the . . . lining [of the furnace] . . . ." (App. 834)

The specification was unaffected by the amendment and continued to refer to "avoiding deep penetration." Moreover, the amendment was accompanied by affidavits from two of the patentees showing that the terms "avoiding deep penetration" and "avoiding material agitation" are equivalent and cover the same concept. As the Patent Office requires, these affidavits

were placed in the "file wrapper" of the Suess patent and were publicly available for purposes of interpreting the patent claims as soon as the patent issued.[7]

The *McLouth* District Court ruled, however, that these affidavits could not be considered in assessing the meaning and scope of the Suess patent claims because persons reading the patent could not be held responsible "for knowing the contents of affidavits filed more than seven years" after the date of the invention.[8] (App. 776-77) Having thus excluded the clarifying affidavits from consideration, the *McLouth* District Court held:

> 1. "Avoiding deep penetration" is the exclusive "gist" of the Basic Oxygen Process, but that subject matter does not appear in the Suess patent claims as required by 35 U.S.C. § 112.[9] (App. 759-64)

[7] It is stipulated that respondent's counsel ordered and received a copy of the complete file wrapper of the Suess patent, including the affidavits, upon issuance of the patent.

[8] This ruling, the effect of which was to exclude crucial evidence from consideration, was plainly wrong. There is no requirement in the law that patent claims be meaningful to a person skilled in the art *at the time when an invention is made*; the law is clear that claims are addressed to persons skilled in the art *at the time when a patent issues*. Clarifying material in the file wrapper of a patent is routinely referred to by persons skilled in the art in order to interpret the scope and meaning of patent claims, and such material must be considered by a court in passing on the validity of such claims. *Ellipse Corp.* v. *Ford Motor Co.*, 452 F.2d 163, 168 (7th Cir. 1971), *cert. denied*, 406 U.S. 948 (1972); *Autogiro Co. of America* v. *United States*, 384 F.2d 391, 397 (Ct. Cl. 1967); see *Graham* v. *John Deere Co.*, 383 U.S. 1, 33 (1966).

[9] The portion of 35 U.S.C. § 112 relied on by the *McLouth* District Court reads as follows: "The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention."

> 2. When the *words* "avoiding deep penetration" were removed from the claims, the *concept* of "avoiding deep penetration" was abandoned, and petitioners are barred by the doctrine of "file wrapper estoppel" from asserting that the Suess patent claims cover that concept.[10] (App. 764-67)
>
> 3. The claim language referring to blowing oxygen "to an extent to avoid material agitation of the bath by the oxygen stream" was neither supported by the Suess patent specification nor meaningful to those skilled in the art of steelmaking. (App. 768-86)

The *McLouth* District Court decided that the Suess patent was therefore invalid, and this decision was affirmed by the Sixth Circuit Court of Appeals. While the appellate court expressed doubts on the issue of obviousness, its holding rested squarely on the rationale adopted by the lower court regarding purported defects in the Suess patent claims. Like the District Court, the appeals court refused to consider the Suess

[10] This issue had been neither pleaded nor argued by the defendant in *McLouth* but was raised *sua sponte* by the *McLouth* District Court, as respondent has stipulated. (App. 205) The doctrine of "file wrapper estoppel" requires that patent claims be "read and interpreted with reference to claims that have been cancelled or rejected and the claims allowed cannot by construction be read to cover what was thus eliminated from the patent." *Schriber-Schroth Co.* v. *Cleveland Trust Co.*, 311 U.S. 211, 220-21 (1940). However, the doctrine does not invariably apply when a claim is amended—only when an amendment serves to abandon concepts "in order to obtain the issuance of a patent by distinguishing the prior art." *Graham* v. *John Deere Co.*, 383 U.S. 1, 33 (1966); *Exhibit Supply Co.* v. *Ace Patents Corp.*, 315 U.S. 126, 136 (1942). The Suess patent claims were not amended to change concepts or "distinguish prior art" but solely because of the semantic preferences of the Patent Examiners. (App. 70-71, 206-16)

patentees' affidavits in interpreting those claims. Recognizing that "the issue of file wrapper estoppel hinges entirely upon the factual determination of abandonment or non-abandonment," the Sixth Circuit concluded that "an inference of abandonment can be drawn from the omission of 'avoidance of deep penetration' from the final claims." (App. 641-42) It observed, however, that "*the record is void* as to the content of the discussion with the Examiner" regarding amendment of the claims. (App. 641, emphasis supplied)

In light of the Sixth Circuit's observation of a "void" in the *McLouth* record—the first time any "void" in the evidence had been suggested—petitioners requested a rehearing and a remand from the appeals court for further findings on the factual question of abandonment. This request was denied. Subsequently, petitioners moved to reopen the record of this *J & L* case for the purpose of filling the alleged "void" noted by the Sixth Circuit.

Upon reopening, more than a year before *Blonder-Tongue* was decided, petitioners introduced the testimony of Claude A. LeRoy, the Primary Patent Examiner responsible for the Suess patent application in the Patent Office, and Byron T. Gardner, the attorney who represented the Suess patentees in the Patent Office. Both witnesses testified that the language of the Suess patent claims had been amended only to express the concept of "avoiding deep penetration" in different words; that the amendment did not result in abandonment of the concept of "avoiding deep penetration"; and that the amendment had been made solely because of the semantic preferences of the Patent Examiners and not to distinguish prior art. (App. 206-08, 211-12) Respondent objected to this testimony as parole evidence but offered no evidence of its own.

This Court's decision in *Blonder-Tongue* was handed down on May 3, 1971. Thereupon respondent reopened the case to plead collateral estoppel on the basis of the *McLouth* holding of invalidity. An evidentiary hearing was held on this issue, at which petitioners introduced the testimony of two former Commissioners of Patents, David L. Ladd and William E. Schuyler, and a former President of the American Patent Law Association, Roberts B. Larson. These witnesses testified that, under controlling legal principles and the practice of the Patent Office, the Suess patentees had not abandoned the concept of "avoiding deep penetration" in the Patent Office proceedings, and therefore no basis existed for the *McLouth* courts' invocation of file wrapper estoppel. (App. 208-11) Petitioners also introduced the testimony of Dr. John Elliott, a steelmaking expert, to the effect that the *McLouth* courts had failed to grasp key aspects of steelmaking technology, as demonstrated by internal inconsistencies in those courts' opinions. Respondent offered no evidence at this reopening.

On January 29, 1974, the District Court rendered its decision in this case, holding on the basis of detailed findings of fact and law that respondent's plea of estoppel must be denied under *Blonder-Tongue,* and that the Suess patent is valid and enforceable and has been infringed by respondent.[11] In accordance with the

[11] Findings relating to the collateral estoppel issue are set forth in an "Opinion Compendium—Collateral Estoppel" (App. 155-486) and summarized in an "Opinion Summary—Collateral Es-

test mandated by this Court in *Blonder-Tongue,* the District Court conducted a principled inquiry into the collateral estoppel issue and articulated reasons why it would be neither just nor equitable to allow the plea of estoppel in this case. The trial court's specific findings were as follows:

> 1. The *McLouth* courts had failed to grasp that the Basic Oxygen Process is a combination of several specific process steps taught in the Suess patent specification, all of which are carried over into the Suess patent claims; that the claim reference to "avoiding material agitation" embodies the same concept as "avoiding deep penetration"; and that "avoiding material agitation" means to the skilled steelmaker that, contrary to the beliefs and teachings of the prior art, he should not try to blow deeply for the purpose of materially stirring or agitating the molten metal with the oxygen jet. (App. 69-70, 76-80, 226-33, 298-303)
>
> 2. The *McLouth* courts had failed to understand key technological aspects of the Basic Oxygen Process and had misconceived fundamental differences between that process and the prior art, which uniformly and mistakenly had relied upon deep penetration of the oxygen jet for the purpose of materially agitating the bath. (App. 66-67, 73, 77-78, 99-101, 144-46, 296-303, 350-54, 366-71, 378-79, 382)
>
> 3. The *McLouth* courts had erred in refusing to consider the patentees' affidavits in the Suess patent file wrapper, which affidavits show that the concept of "avoiding deep penetration" was never abandoned. (App. 313-14, 450)

toppel" (App. 43-153); the findings in the Opinion Compendium also serve as background for the District Court's decision on the merits in an "Opinion—The Jones & Laughlin Cases." (App. 487-593)

> 4. Because abandonment of the concept of "avoiding deep penetration" was an affirmative defense neither pleaded nor argued in *McLouth*, and because the *McLouth* courts erroneously ignored the file wrapper affidavits bearing on that issue, petitioners were deprived in *McLouth* of a reasonable opportunity to present the uncontroverted additional evidence introduced in this case which confirms that no abandonment occurred. (App. 222-23)
>
> 5. Petitioners should not be faulted under *Blonder-Tongue* for the absence of that additional evidence in *McLouth,* since the *McLouth* District Court's *sua sponte* finding of abandonment and holding of file wrapper estoppel were plainly wrong as a matter of law on the *McLouth* record and since the alleged "void" in the evidence on the abandonment issue was suggested for the first time in the opinion of the *McLouth* Court of Appeals. (App. 450-56)
>
> 6. Since the *McLouth* District Court believed that "avoiding deep penetration" was the exclusive "gist" of the Basic Oxygen Process, its finding that the Suess patentees had abandoned that concept was critical to its conclusion that the Suess patent claims were fatally defective under 35 U.S.C. § 112. (App. 144-45)
>
> 7. The *McLouth* Court of Appeals, in affirming, accepted the fundamental misconceptions of the *McLouth* District Court and failed to correct its errors. (App. 118-19, 145, 152)

For these reasons, the trial court in this case concluded that, under the standards of *Blonder-Tongue,* petitioners did not have a "fair opportunity procedurally, substantively and evidentially to pursue [their] claim" in *McLouth* and that it would be neither just nor equitable to apply collateral estoppel based

on *McLouth*. (App. 151-53) The *McLouth* proceedings, the District Court found, were "seriously defective," and had deprived petitioners of the fruits of a revolutionary invention on grounds which were not only highly technical but plainly wrong. (App. 152) The trial court considered its denial of the estoppel plea all the more appropriate because *McLouth* was litigated while *Triplett* v. *Lowell* was the law, and because this case offered a substantially more complete record on which to adjudicate the validity of the Suess patent than the record in *McLouth*. (App. 135-36, 221-23)

Having denied the plea of estoppel, the District Court addressed the merits of the case. It held that the Suess patent claims are sufficiently precise to fulfill the requirements of law, that the Suess patent is valid and enforceable in all other respects, and that J & L has breached its license agreement with Kaiser and infringed the Suess patent in its unlicensed operations.

The Third Circuit Court of Appeals reversed, holding that "the District Court was obliged to accept the defense of collateral estoppel." (App. 2) The Court of Appeals recognized that the Suess patent is the "fundamental" United States patent on the Basic Oxygen Process, that the process represents a "material technological advance" in the art of steelmaking which has achieved "remarkable success," and that all prior attempts at oxygen steelmaking "were never exploited commercially." (App. 3, 5) The Court of Appeals did not, however, decide the merits of the case. Its decision was premised solely on its conception of collateral estoppel under *Blonder-Tongue,* and was entirely "a matter of law." (App. 30)

REASONS FOR GRANTING THE WRIT

The Court should grant certiorari in this case in order to review the failure of the Court of Appeals to follow this Court's decision in *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation,* 402 U.S. 313 (1971).

In *Blonder-Tongue* this Court partially overruled *Triplett* v. *Lowell,* 297 U.S. 638 (1936), and eliminated an anomaly which had existed in patent law for many years. *Triplett* had held that collateral estoppel would not bar a suit for infringement of a patent previously held invalid unless "mutuality" was established—that is, unless the parties to the second suit were the same as in the first. In *Blonder-Tongue* the Court noted that the mutuality requirement had been abandoned in other areas of the law and held that the *Triplett* rule for patent cases could no longer be justified. In so holding the Court enunciated certain criteria for determining when non-mutual collateral estoppel would or would not apply in patent cases:

> [W]e do not suggest, without legislative guidance, that a plea of estoppel by an infringement or royalty suit defendant must automatically be accepted once the defendant in support of his plea identifies the issue in suit as the identical question finally decided against the patentee or one of his privies in previous litigation. Rather, the patentee-plaintiff must be permitted to demonstrate, if he can, that he did not have "a fair opportunity procedurally, substantively and evidentially to pursue his claim the first time." . . . This element in the estoppel decision will comprehend, we believe, the important concerns about the complexity of patent litigation and the posited hazard that the prior proceedings were seriously defective.

Determining whether a patentee has had a full and fair chance to litigate the validity of his patent in an earlier case is of necessity not a simple matter. In addition to the considerations of choice of forum and incentive to litigate mentioned above, certain other factors immediately emerge. For example, if the issue is nonobviousness, appropriate inquiries would be whether the first validity determination purported to employ the standards announced in *Graham* v. *John Deere Co.*, . . .; whether the opinions filed by the District Court and the reviewing court, if any, indicate that the prior case was one of those relatively rare instances where the courts wholly failed to grasp the technical subject matter and issues in suit; and whether without fault of his own the patentee was deprived of crucial evidence or witnesses in the first litigation. But as so often is the case, no one set of facts, no one collection of words or phrases, will provide an automatic formula for proper rulings on estoppel pleas. In the end, decision will necessarily rest on the trial courts' sense of justice and equity.

> . . . [T]he court in the second litigation must decide in a principled way whether or not it is just and equitable to allow the plea of estoppel in the case before it. 402 U.S. at 333-34. (footnotes and citations omitted)

Thus, in partially overruling *Triplett, Blonder-Tongue* mandated a fair and flexible approach to the estoppel determination in patent cases. It described examples of "appropriate inquiries" bearing on that determination and ultimately referred the determination to the trial courts' principled "sense of justice and equity."

In this case the Court of Appeals refused to accept the ultimate *Blonder-Tongue* test. It disregarded a principled determination by the trial court that, for

reasons of justice and equity, respondent's estoppel plea should be denied. And it read *Blonder-Tongue* as erecting a virtually absolute bar to any action to enforce a patent previously held invalid. The net effect of the Court of Appeals' holding, unless reversed by this Court, is to replace *Triplett's* unduly lenient rule, and *Blonder-Tongue's* flexible approach, with a new rule in patent cases which is far more stringent than the collateral estoppel rule applied generally in other areas of the law.

The test applied by the Court of Appeals represents the culmination of a trend among lower federal courts, which apparently have come to believe that *Blonder-Tongue* automatically precludes relitigation of patent validity issues, except perhaps when a patentee-plaintiff can demonstrate a denial of procedural due process in the first litigation. *Blonder-Tongue* did not so hold. And this case affords the Court an opportunity to make clear not only to the Third Circuit but to other federal courts that *Blonder-Tongue* is not intended as an absolute bar to relitigation but, on the contrary, that *Blonder-Tongue* means what it plainly says.

DISCUSSION

I. The Court of Appeals Decided This Case in a Way in Conflict With Blonder-Tongue by Refusing To Accept the Ultimate Blonder-Tongue Test—a Trial Court's Principled Determination That It Would Not Be "Just and Equitable To Allow the Plea of Estoppel in the Case Before It"—and by Holding Instead That Collateral Estoppel Must Automatically Be Applied Because the McLouth Proceedings Met the Standards of Procedural Due Process.

In reversing the District Court, the Court of Appeals applied an erroneous and excessively rigid stand-

ard of collateral estoppel which is not consistent with the language or the rationale of *Blonder-Tongue*. The Court of Appeals reasoned as follows: First, "the *sole* ground explicitly recognized by the Supreme Court to defeat a motion for summary judgment made in the second case and premised on *Blonder-Tongue* is that the first adjudication did not provide a 'full and fair opportunity to litigate.'" (App. 24, emphasis supplied) Second, the *Blonder-Tongue* "guidelines suggested for reaching a result permitting relitigation are replete with qualifying words making a patentee's burden onerous." (App. 24) Third, the *Blonder-Tongue* reference to "justice and equity" does not "constitute a departure from the exacting language used by the Supreme Court earlier in the same paragraph of its opinion." (App. 25)

The Court of Appeals thus adopted an interpretation of *Blonder-Tongue* under which a collateral estoppel plea must automatically be accepted unless one of the express "guidelines" of *Blonder-Tongue* applies —that is, unless petitioners could demonstrate that, "without fault of [their] own," they were deprived of "crucial evidence or witnesses" in *McLouth*; or that *McLouth* was "one of those relatively rare instances where the courts wholly failed to grasp the technical subject matter and issues in suit."[12] The Court of Appeals concluded that the deprivation of evidence in *McLouth*, as found by the District Court, did not fall within the "guidelines" because the evidence in question was not "crucial" and petitioners were not "without fault" in failing to present it in *McLouth*. (App.

[12] 402 U.S. at 333. The full text of the *Blonder-Tongue* "guidelines" cited by the Court of Appeals is set forth at pp. 15-16, *supra*.

32-33) The appeals court also concluded that the *McLouth* tribunals had not "wholly failed to grasp the technical subject matter and issues in suit," since "Judge Freeman . . . allocated an unusual amount of time to the trial, and devoted considerable effort to understanding the underlying industrial and scientific principles," "conducted intelligent questioning," and "produced a comprehensive and comprehensible opinion." (App. 34-35)

The Court of Appeals made two fundamental errors in holding that the plea of estoppel must be accepted in this case. First, it disregarded the fact that the *Blonder-Tongue* "guidelines" were not described as such in *Blonder-Tongue* but were stated to be merely *"appropriate inquiries"* bearing on the estoppel determination. This Court made it clear that these "appropriate inquiries" were illustrative and that the ultimate test of estoppel was: "in the end, decision will necessarily rest on the trial courts' [principled] sense of justice and equity." Second, even if it is assumed *arguendo* that the "appropriate inquiries" are the sum total of the collateral estoppel test in patent cases, the Court of Appeals misinterpreted those "appropriate inquiries" by applying them in a rigid and unreasonable way. Under any reasonable interpretation, the "appropriate inquiries" dictate that the estoppel plea be rejected in this case.

Blonder-Tongue held that the *Triplett* requirement of "mutuality" is neither "essential to effectuate the purposes of the patent system" nor "an indispensable or even effective safeguard against faulty trials and judgments." 402 U.S. at 334. Therefore, the Court concluded, "*Triplett* should be overruled to the extent it forecloses a plea of estoppel by one facing a charge of

infringement of a patent that has once been declared invalid." *Id.* at 350. However, this Court explicitly declined to erect an "automatic" rule of collateral estoppel; repeatedly it expressed a concern for fairness to litigants and flexibility in decision-making. *Id.* at 328, 333-35, 349.[13] Thus the Court held that the standards for applying non-mutual estoppel in patent cases would include pragmatic considerations—illustrated by "appropriate inquiries"—under which relitigation would be allowed if the prior proceeding did not afford the patentee-plaintiff a "full and fair chance to litigate" or was otherwise "seriously defective." *Id.* at 333. And ultimately, the decision whether to apply estoppel would rest upon the judgment of the trial court in the second litigation, which was enjoined to "decide in a principled way whether or not it is just and equitable to allow the plea of estoppel in the case before it." *Id.* at 334.

In this case the trial court scrupulously followed the *Blonder-Tongue* instructions for passing upon estoppel pleas. It decided "in a principled way" that, for reasons of justice and equity, estoppel should not apply here. And it based that decision on specific findings which are fully supported by the record:

> —The Basic Oxygen Process is a great and patentable invention, and the *McLouth* courts' decision to strike down the patent on that invention rested

[13] Neither party in *Blonder-Tongue* had argued that *Triplett* should be overruled. 402 U.S. at 318-19. The Government, which did take the position that the mutuality requirement should be removed in patent cases, contended that "*a flat rule of estoppel would not be warranted.*" Brief for the United States as Amicus Curiae, p. 34 (emphasis supplied).

on grounds which were not only hypertechnical but plainly wrong. (App. 151-53) [14]

—The *McLouth* courts' belief that the Suess patent claims were indefinite reflected a fundamental misinterpretation of expert testimony and scientific fact. (App. 144-46)

—The *McLouth* courts' *sua sponte* finding of abandonment of the concept of "avoiding deep penetration," and their invocation of file wrapper estoppel, were plainly erroneous in light of the affidavits in the Suess patent file wrapper and other relevant evidence. (App. 449-55)

—New evidence presented in this case demonstrates beyond any doubt that the concept of "avoiding deep penetration" was never abandoned. (App. 223, 540-545).[15]

—The *McLouth* courts' belief that the concept of "avoiding deep penetration" had been abandoned permeated their discussion of the Suess patent claims and formed the basis for the *McLouth* invalidity decision. (App. 144-45)

[14] The Court's decision in *Blonder-Tongue* addresses itself in the main to situations in which patent invalidity is based on anticipation, obviousness, inventorship, and the like—all matters precluding the issuance of any patent to the prospective patentee. 402 U.S. at 343, 344-50. The *McLouth* holding of invalidity was expressly premised not on such issues of patentability but solely upon the language employed in the claims of the Suess patent.

[15] This new evidence—the testimony of Patent Examiner LeRoy and attorney Gardner—conclusively shows that the words "avoiding deep penetration" were removed from the Suess patent claims not to change the concepts covered by those claims or to distinguish prior art but solely because of the semantic preferences of the Patent Office. See pp. 10-11, *supra*. In these circumstances, there is no abandonment and file wrapper estoppel does not apply. See n. 10, *supra*.

—The record in this case is more complete and permits a better undersanding of the issues than the record before the *McLouth* courts. (App. 223, 545)

The Court of Appeals did not question these findings, much less find them clearly erroneous; it simply ignored them. It thus rejected the District Court's common-sense inquiry into the fundamental defects of the *McLouth* proceeding. And, declining to "acquiesce" in a principled determination based on the trial court's sense of justice and equity (App. 25), the Court of Appeals refused to follow the ultimate *Blonder-Tongue* test.[16]

Instead, the Court of Appeals applied an inflexible test of its own which cannot be reconciled with the *Blonder-Tongue* decision. Failing to heed the *Blonder-Tongue* admonition that "no one set of facts, no one collection of words or phrases will provide an automatic formula for proper rulings on estoppel pleas," 402 U.S. at 333-34, the Court of Appeals relied exclusively on a narrow reading of certain words and phrases appearing in the *Blonder-Tongue* opinion and disregarded this Court's caveat that these words and phrases should not be exalted to the status of an "automatic formula." And the Court of Appeals then compounded its error by misinterpreting the very words and phrases on which it relied.

[16] The Court of Appeals charged petitioners with reliance upon "generalized concepts of justice and equity" and the District Court with "unarticulated and unreviewable determinations." (App. 25) Neither of these characterizations is apt. Petitioners have consistently recognized—as *Blonder-Tongue* holds—that on the question whether the prior case afforded a "full and fair chance to litigate," the trial courts' "sense of justice and equity" must be exercised in "principled" fashion. See pp. 22, 23, and 33 of the Brief for Plaintiffs-Appellees in the Third Circuit, a copy of which has been lodged with the Clerk of this Court for the convenience of the Court. And it cannot reasonably be denied that the District Court in this case did make, and articulate, a "principled" determination under *Blonder-Tongue*. (App. 44-486) However, the Court of Appeals considered itself free to ignore both that determination and the trial court's findings of fact.

A. "... *deprived of crucial evidence* ..."

One example of an "appropriate inquiry" mentioned in *Blonder-Tongue* as bearing on the question of what constitutes a "full and fair chance to litigate" is "whether without fault of his own the patentee was deprived of crucial evidence or witnesses in the first litigation." 402 U.S. at 333. The Court of Appeals held that petitioners had not been deprived of "crucial" evidence in the *McLouth* case because the evidence in question—demonstrating that the concept of "avoiding deep penetration" had not been abandoned—might not have changed the *McLouth* result. The Court of Appeals reached this conclusion because it believed the *McLouth* judgment of invalidity rested on "independent grounds"—defects in the claim language *and* abandonment of the concept of "avoiding deep penetration." (App. 32)

This holding of the Court of Appeals reflected an unreasonable reading of the *Blonder-Tongue* term "crucial." The "independent grounds" of indefiniteness and abandonment were inextricably intertwined in *McLouth*: The *McLouth* District Court's finding that what it considered to be the exclusive "gist" of the Basic Oxygen Process—the concept of "avoiding deep penetration"—had been abandoned in drafting the Suess patent claims inevitably led that court to find the claims defective. Thus, the issue of aban-

donment lay at the heart of the *McLouth* holding of invalidity. Moreover, vital evidence bearing upon a principal ground for a court's decision is "crucial" within the meaning of *Blonder-Tongue,* even if other grounds for the decision appear to exist.[17]

B. "... *without fault of their own* ..."

The Court of Appeals next adopted a highly technical and unreasonable construction of the *Blonder-Tongue* term "fault," holding that the deprivation of evidence on the abandonment issue in *McLouth* was not "without fault" of the petitioners. (App. 33) The Court of Appeals reasoned that petitioners' counsel on the *McLouth* appeal had "relied on the legal argument that no file wrapper estoppel should obtain" and did not argue that "crucial" evidence was lacking in the *McLouth* record. (App. 32) The Court of Appeals charged petitioners with "now ... [assuming] a different posture and [raising] ... objections to the *McLouth* proceeding that are bottomed, not on the legal aspects of file wrapper estoppel, but rather on the foreclosure of evidence. In the absence of a compelling reason why [they] ... could not have raised this objection at the time of the *McLouth* appeal, [petitioners are] ... not at liberty to voice such a protest here." (App. 32-33)

[17] While a judgment based on alternative grounds can give rise to collateral estoppel in a subsequent case in which both grounds apply, such a judgment does not estop the defeated party on any one of the grounds standing alone. *Halpern* v. *Schwartz,* 426 F.2d 102, 105 (2d Cir. 1970); *Restatement (Second) Judgments,* § 68, Comment (*i*), at 155-57 (Tent. Draft No. 1, 1973). Therefore, the Court of Appeals erred in denying the "crucial" nature of the evidence in question on the basis of an "alternative" ground for the *McLouth* judgment.

This analysis is erroneous not only because it is unreasonably rigid, but also because its premises are incorrect:

> —Petitioners *did* raise the "foreclosure of evidence" point on appeal in *McLouth.* In their petition for rehearing in the Sixth Circuit, after that court's opinion had referred to an alleged significant "void" in the *McLouth* record (a "void" suggested in the Sixth Circuit opinion for the first time in the entire course of the *McLouth* proceedings), petitioners urged that "if the Court is in doubt, it should remand the case for findings on the *factual* question of abandonment."[18]
>
> —It was not until the Sixth Circuit affirmed the *McLouth* District Court, disregarding the Suess patentees' affidavits in the Suess file wrapper and calling attention to the purported "void" in the record, that further evidence on the abandonment issue became "crucial."[19]
>
> —It simply is not the case that petitioners took a "different posture" in this litigation from their posture in *McLouth.* Petitioners contend that they were deprived in *McLouth* of the opportunity to present crucial evidence; but that is not the sole ground on which they have objected to the *McLouth* invocation of file wrapper estoppel and their objections are certainly not "bottomed" on it alone. Petitioners have consistently maintained,

[18] Plaintiffs-Appellants' Petition for Rehearing in the Sixth Circuit, p. 9 (emphasis in original). A copy of this Petition has been lodged with the Clerk of this Court for the convenience of the Court.

[19] The *McLouth* District Court's finding of abandonment was so clearly erroneous that McLouth did not seek to support that finding on appeal. See Brief of McLouth Steel Corporation in the Sixth Circuit. A copy of this Brief has been lodged with the Clerk of this Court for the convenience of the Court.

and continued to maintain before the Third Circuit, that the *McLouth* courts committed legal error on the record of the *McLouth* trial by refusing to consider the affidavits in the Suess patent file wrapper and that, in light of those affidavits, file wrapper estoppel was improperly invoked in *McLouth*.[20]

Further, the Third Circuit erroneously chose to disregard the District Court's conclusion that, since *McLouth* was fully litigated while *Triplett* v. *Lowell* was the law, it would not be fair to "fault" petitioners under *Blonder-Tongue* for the absence of additional evidence on the abandonment issue in *McLouth*. (App. 221-22) Consideration of this point by the District Court was clearly appropriate under the flexible *Blonder-Tongue* approach to collateral estoppel.

C. "*. . . wholly failed to grasp . . .*"

Another "appropriate inquiry" mentioned in *Blonder-Tongue* is "whether the opinions filed by the District Court and the reviewing court, if any, indicate that the prior case was one of those relatively rare instances where the courts wholly failed to grasp the technical subject matter and issues in suit." 402 U.S. at 333. The Court of Appeals held that the *McLouth* courts had not "wholly" failed to grasp the technical subject matter and issues because it appeared, from the face of those courts' opinions, that they "came to conclusions *not altogether in disregard* of the relevant technology, the evidence presented, and the governing principles of law." (App. 40, emphasis supplied) However, petitioners do not contend that the

[20] See Brief for Plaintiffs-Appellees in the Third Circuit, pp. 25-26.

McLouth courts altogether disregarded or failed to understand all of the issues in the case before them. They do contend—and the District Court in this case held—that the *McLouth* courts failed to grasp significant technical matters bearing upon the proper construction of the Suess patent claims, and that the construction of the claims has become the key issue in this litigation.

The *McLouth* courts' fundamental technical errors lay in failing to recognize that the Basic Oxygen Process represents a composite of numerous features, all of which appear in both the Suess patent specification and the Suess patent claims and, in particular, that the claim reference to "avoiding material agitation" embodies the very same concept as the specification references to "avoiding deep penetration." These errors were apparent to the *J & L* District Court from the *McLouth* opinions and record. While the Court of Appeals decried the scope of the District Court's "extraordinary wide-ranging scrutiny of the first trial" (App. 39), it apparently failed to note that this case was fully tried before *Blonder-Tongue* was decided and that much of the record in *McLouth* had been incorporated in the record of this case by stipulation of the parties. Thus the Court of Appeals criticized the District Court for failing to disregard for purposes of the collateral estoppel determination what the District Court already knew about the *McLouth* record and the issues in suit long before the plea of collateral estoppel was even raised.

* * *

Under the Court of Appeals' test, collateral estoppel must apply unless either (a) evidence which would

necessarily change the result in a prior proceeding was not before the prior court and such evidence could not have been discovered by the patentee-plaintiff; or (b) the opinions in the previous case were, on their face, unresponsive to the issues in suit or wholly unintelligible. This is surely not the test of *Blonder-Tongue*. Contrary to *Blonder-Tongue,* the Court of Appeals' test would make collateral estoppel an automatic and absolute bar to any action to enforce a patent previously held invalid, as long as the prior action did not involve an error of constitutional dimensions. And contrary to *Blonder-Tongue,* the Court of Appeals' test would remove the collateral estoppel determination from the trial court and permit the reviewing court to disregard both the trial court's findings of fact and its "sense of justice and equity."

The Court of Appeals found support for its rigid approach in decisions such as *Blumcraft of Pittsburgh* v. *Kawneer Co., Inc.,* 482 F.2d 542 (5th Cir. 1973); *Sampson* v. *Ampex Corp.,* 478 F.2d 339 (2d Cir. 1973); and the decision in *Blonder-Tongue* itself following remand from this Court, 334 F. Supp. 47 (N.D. Ill. 1971). While these cases do not involve considerations of fairness such as those identified by the trial court in this case, it is true that dicta in the cited decisions seem to reflect a very narrow reading of *Blonder-Tongue*. In *Blumcraft of Pittsburgh,* for example, the Court of Appeals stated that "*Blonder-Tongue* did not throw merely a jab at the multiplicity of patent litigation; rather, it intended a *knockout blow* through the doctrine of collateral estoppel." 482 F.2d at 549 (emphasis supplied). The *Sampson* court referred to "egregious error" in the prior case as the only available *Blonder-Tongue* exception. 478 F.2d at 342. And

in *Blonder-Tongue* on remand, the District Court suggested that "the second court must defer unless it appears from the face of the prior opinions that the first court *completely missed the point.*" 334 F. Supp. at 50 (emphasis supplied).

Thus it would appear that the Court of Appeals is not alone in interpreting *Blonder-Tongue* as a virtually automatic bar to relitigation of patent validity issues. Although the lower courts, like the Court of Appeals here, pay lip service to the notion that estoppel will not apply in some cases, upon analysis it is likely that no case will ever meet the stringent standards that have been erected. And this is particularly apparent in light of the Court of Appeals' decision in this case, which drains the last vestige of flexibility from *Blonder-Tongue*.

II. The Court of Appeals' Interpretation of Blonder-Tongue Erects an Even More Stringent Bar to Relitigation of Patent Validity Issues Than the General Rules of Collateral Estoppel Applied in Other Areas of the Law.

A further consequence of the Court of Appeals' interpretation of *Blonder-Tongue* is that it would bar relitigation of patent validity issues to a greater extent than the general rule of collateral estoppel precludes relitigation in other areas of the law. Nothing in the *Blonder-Tongue* decision suggests that this Court intended such a result when it overruled the mutuality requirement of *Triplett*.

Numerous cases from the general law of collateral estoppel have held that a plea of estoppel must be denied, despite a prior adjudication meeting the standards of due process, where (a) application of estoppel would work an injustice, (b) the decision of the prior

court was plainly wrong, or (c) the availability of evidence not before the prior court or other considerations give reason to believe that the second court will be in a substantially better position than the prior court to reach a correct result.[21] Under such authorities, the findings of fact of the District Court fully support denial of the estoppel plea in this case.

The *Restatement (Second) of Judgments,* in its present version, also makes it clear that the test of collateral estoppel applied by the Court of Appeals is substantially more stringent than the test applied generally. Like *Blonder-Tongue,* the *Restatement* calls for a threshold inquiry whether the issue in suit was "actually litigated and determined" in a prior action and whether the party against whom collateral estoppel is asserted was afforded "an adequate opportunity or incentive to obtain a full and fair adjudication" of the issue in the prior proceeding.[22] When, as in this case, the estoppel plea is asserted by a person not a party to the prior action, the *Restatement* provides that estoppel must be denied if special circumstances

[21] *La Societe Anonyme des Parfums LeGalion* v. *Jean Patou, Inc.,* 495 F.2d 1265, 1276 (2d Cir. 1974), and authorities there cited; *Menendez* v. *Saks and Co.,* 485 F.2d 1355, 1363-64 (2d Cir. 1973), and authorities there cited; *Grantham* v. *McGraw Edison Company,* 444 F.2d 210, 216-17 (7th Cir. 1971); *Berner* v. *British Commonwealth Pacific Airlines, Ltd.,* 346 F.2d 532, 538-41 (2d Cir. 1965); *Spilker* v. *Hankin,* 188 F.2d 35, 37-38 (D.C. Cir. 1951); *Henderson* v. *Bardahl International Corp.,* 72 Wash. 2d 109, 118-19, 431 P.2d 961, 967-68 (1967).

[22] *Restatement (Second) Judgments,* § 68.1 (Tent. Draft No. 1, 1973). The official comments to this *Restatement* draft state that "full and fair adjudication" is not a due process test but an inquiry into "unfairness," and that the trial court's "discretion to deny preclusive effect" is "central to the fair administration" of the collateral estoppel doctrine. *Id.,* Comment (*j*), at 182-83.

—whether or not amounting to denial of a party's full and fair opportunity to litigate—"make it appropriate that the party be permitted to relitigate the issue."[23] The official comment to this provision states:[24]

> Important among such other circumstances is the disclosure that the prior determination was *plainly wrong* or that *new evidence has become available that could likely lead to a different result.* It is unnecessary that the party seeking to avoid preclusion show, as he must in seeking to set aside a judgment, that the evidence could not have been discovered with due diligence; *the question is not whether a prior determination should be set aside but whether it should be treated as conclusive for further purposes.*

The Reporters of the *Restatement* cite as authority for this proposition decisions in non-patent cases as well as this Court's decision in *Blonder-Tongue.*[25]

The limitations on collateral estoppel under the Court of Appeals' test are much more restrictive than those recognized in the *Restatement.* While the *Restatement* test requires only that evidence which was not before the prior court "could likely lead to a different result," the Court of Appeals would require that the evidence be, *per se,* determinative. While the *Restatement* test requires only a showing that new evidence has become available, the Court of Appeals would require the plaintiff to prove that he bears no

[23] *Restatement (Second) Judgments,* § 88(7) (Tent. Draft No. 2, 1975).

[24] *Id.,* Comment (*i*), at 97 (emphasis supplied).

[25] *Id.,* Reporter's Note, at 101-02.

responsibility whatever for the absence of that evidence in the first proceeding. And while the *Restatement* test would require appropriate inquiry to determine whether the first court was "plainly wrong," the Court of Appeals would bar such inquiry as long as the opinions in the first case, without reference to the record of that case, are "internally consistent" and "appear compatible . . . with the language of the patent at issue and the principles of controlling law." (App. 36) [26]

The official notes to the *Restatement* summarize the test of non-mutual estoppel as follows: "The ultimate question is whether there is good reason, all things considered, to allow the party to relitigate the issue." [27] Under this test the findings of fact by the District Court in this case not only support rejection of the estoppel plea—they require it. The question posed in this case, and which only this Court can answer, is whether *Blonder-Tongue* was intended to pass from the rule of *Triplett* precluding non-mutual collateral estoppel in patent cases to a rule of virtually automatic estoppel unknown to the rest of the law.

CONCLUSION

By the time *Blonder-Tongue* was decided, this case had been fully tried on the merits, much of the record

[26] The Court of Appeals' limitation of the trial court's inquiry is clearly inconsistent with this Court's instruction on remand of the *Blonder-Tongue* case that the patentee should "be permitted . . . to supplement the record with *any evidence* showing why an estoppel should not be imposed . . . ." 402 U.S. at 350 (emphasis supplied).

[27] *Restatement (Second) Judgments*, § 88(7) (Tent. Draft No. 2, 1975) Reporter's Note, at 102.

in *McLouth* had been incorporated in the record by stipulation of the parties, and the original trial record had been supplemented with new evidence, not before the *McLouth* courts, on the key issue of abandonment. After the *Blonder-Tongue* decision was rendered, and in accordance with that decision, the District Court took additional evidence on the collateral estoppel issue, made a careful and conscientious review of the voluminous record before it, and applied the *Blonder-Tongue* standard for ruling on estoppel pleas. On the basis of extensive findings of fact supported by the record, it held that respondent's plea of collateral estoppel must be denied under *Blonder-Tongue*.

Without questioning any of the District Court's findings of fact, the Court of Appeals held as a matter of law that respondent's plea of collateral estoppel must be accepted. In reaching this holding the Court of Appeals ignored the trial court's principled decision under *Blonder-Tongue* and interpreted *Blonder-Tongue* as establishing a virtually absolute bar to relitigation of patent validity issues.

The test of collateral estoppel applied by the Court of Appeals is contrary to this Court's decision in *Blonder-Tongue* and substantially more restrictive than the collateral estoppel rule applied in other areas of the law. That erroneous test represents the culmination of a trend in the lower federal courts. The effect of its application in this case, unless reversed by this Court, will be to preclude petitioners from enforcing the patent on a great invention despite the fact that that patent satisfies all requirements of law and was found invalid in *McLouth* on grounds that were both hypertechnical and plainly wrong.

In a recent address, C. Marshall Dann, United States Commissioner of Patents and Trademarks, said the following about a hypertechnical approach to the disposition of patent cases:

> Too often we allow the process of obtaining and enforcing patents to be controlled by matters having little to do with the merits of the inventions at issue.
>
> To make the patent system provide its much needed incentives, all concerned—patent examiners, patent lawyers, judges in patent cases and legislators should concentrate their efforts on two things: to assure patent protection for patentable inventions and to deny protection for unpatentable ones. It should be of distinctly secondary concern whether the attorney may have used poor judgment in the way he drew the claims, in his prosecution tactics, or even in whether he told the Patent and Trademark Office about every potential reference he may have known of.
>
> In this context, the only things that are really matters of substance are whether the invention is new, useful and unobvious and whether it is adequately disclosed in the patent specification. Everything else can be thought of as form.
>
> When an invention is new, useful and unobvious and is suitably disclosed, the public has received everything the patent laws are intended to give it in return for the grant of a patent. (Address before the Southwestern Legal Foundation, Dallas, Texas, March 7, 1975, reprinted in 8 *World Technology,* April 1975, at 17.)

It is petitioners' view that Commissioner Dann's observations are pertinent to both the determination of patent validity and the collateral estoppel issue addressed in this Petition.

For the foregoing reasons, this Court should issue a writ of certiorari to review the opinion and judgment of the Court of Appeals.

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